92-909

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No. _____

In The

Supreme Court of the United States

October Term, 1992

DONALD LEE TIPTON and LINDA TIPTON,

Petitioners,

v.

BERGROHR GMBH-SIEGEN and
BERGROHR GMBH-HERNE,

Respondents.

Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the opinion of the Eleventh Circuit Court of Appeals conflict with this Court's decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d, 265 (1986), and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d, 142 (1970), by requiring the party opposing a motion for summary judgment to come forward with evidence on issues not even raised in the motion?

LIST OF ALL PARTIES TO PROCEEDING IN ELEVENTH CIRCUIT COURT OF APPEALS

1. Donald Lee Tipton.
2. Linda Tipton.
3. Bergrohr GMBH-Herne.
4. Bergrohr GMBH-Siegen.
5. Berg Beteilgings, GMBH, parent of Bergrohr GMBH-Herne.
6. A. G. der Dillinger Hottenwerke, parent of Bergrohr GMBH-Herne.
7. Trust Beneficiaries of Dr. Erich Berg Trust, 52.5% stockholders of Bergrohr GMBH-Siegen.
8. GEBR Berg OHG, Siegen, 47.5% stockholder of Bergrohr GMBH-Siegen.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THIS CASE BY OTHER COURTS

1. *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994 (11th Cir. 1992).

No. _____

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DONALD LEE TIPTON and LINDA TIPTON,

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BERGROHR GMBH-SIEGEN and
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Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the opinion of the Eleventh Circuit Court of Appeals is July 8, 1992 (Appendix A). The date of denial of a timely petition for rehearing is September 4, 1992 (Appendix B). The statutory provision believed to confer jurisdiction on this court is 28 U.S.C. § 1254(1):

> § 1254. Courts of appeals; certiorari; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Petitioners, Donald Lee Tipton and Linda Tipton (collectively "Tipton") sued appellees, Bergrohr GMBH-Siegen and Bergrohr GMBH-Herne ("Siegen and Herne"), seeking damages for personal injuries suffered when a large metal roller fell out of a pipe making machine known as a "sizer" and struck Tipton's foot (Appendix E). The amended complaint alleged that the sizer had been designed by Siegen and Herne and was defective and negligently designed (*Id.*). The amended complaint also alleged that Siegen and Herne had undertaken to ensure the safe operation of the sizer after it was delivered and had negligently failed to do so (*Id.*). Federal jurisdiction was based on 28 U.S.C. § 1332(a)(2) in that the Tiptons are Florida ~~citizens~~ and all defendants are German corporations with principal places of business in Germany (*Id.*).

Siegen and Herne moved for summary judgment on the ground that they were not "in the business" of making sizer machines, had designed the sizer for a company with which they had elements of common ownership, and therefore could not be liable under Florida product liability law (Appendix D). Siegen made the additional argument that it had not been involved in designing the sizer. The district court granted the motion for summary judgment on the same ground argued in the motion for

summary judgment, to wit, that Siegen and Herne were not "in the business" of making sizer machines and therefore, could not be liable under Florida law (Appendix C).[1]

The district court based its decision on two Florida cases: *Lane v. International Paper Co.*, 545 So.2d 484 (Fla. 1st D.C.A. 1989); and *Johnson v. Supro Corp.*, 498 So.2d 528 (Fla. 3d D.C.A. 1986). Both cases hold that a product designer must be in the business of making or selling the product in order to be held liable under a product liability theory.

On Tipton's appeal from the summary judgment, the court of appeals held that Florida product liability law prevents a product designer from being held liable for negligent design unless it is "in the business" of making or selling the product. The court held Tipton's claim that Siegen and Herne negligently failed to ensure the safe operation of the sizer after delivery was a "general negligence" rather than a "product liability" claim and, therefore, was permissible under Florida law (965 F.2d at 997, n.9). However, under *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d, 265 (1986), the court held that Siegen and Herne's motion for summary judgment had shifted to Tipton the burden of placing in the record evidence of how the accident occurred and evidence of Siegen and Herne's negligence (965 F.2d at 998-100). Finding no such evidence in the record, the court affirmed the summary judgment.

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[1] The court noted that there was evidence linking Siegen to the design of the sizer and thus did not rule for Siegen on the basis of its argument that it did not participate in the design.

Tipton petitioned for rehearing on the ground that under *Celotex* and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d, 142 (1970), a motion for summary judgment on the narrow ground that Siegen and Herne were not in the business of making or selling sizer machines did not require Tipton to come forward with evidence of how the accident happened or evidence of negligence. The court of appeals denied the petition for rehearing (Appendix B).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

The writ should be allowed because the decision of the Eleventh Circuit Court of Appeals conflicts with two decisions of this court: *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d, 265 (1986); and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d, 142 (1970). *Adickes* spelled out the general rule in summary judgment cases: the moving party "has the burden of showing the absence of a genuine issue of material fact" and the nonmoving party is "not required to come forth with suitable opposing affidavits" unless and until that burden is met. (398 U.S. at 157, 160; 90 S.Ct. at 1608, 1610).

If *Adickes* were this Court's last word on the subject, the summary judgment clearly should have been reversed, because Siegen and Herne did not meet their initial burden of showing that they were not negligent after the sizer was delivered. However, the court of appeals obviously felt that *Celotex* had materially

changed the burden placed on a party opposing a motion for summary judgment. In the court's view, Siegen and Herne's motion for summary judgment based on the ground that they were immune from liability because they were not in the pipe-making business required Tipton to prove how the accident happened and that they were negligent. Based on its reading of *Celotex*, the court held that Tipton had the burden of placing in the record evidence of "what adjustments or alterations Siegen and Herne made, or should have made, to ensure the safe operation of the sizer machine" (965 F.2d at 999).

Celotex was an asbestos exposure case in which the defendant, Celotex, moved for summary judgment on the ground that there was no evidence that Celotex's product had caused the plaintiff's injuries. There was record evidence that the plaintiff could not prove exposure to Celotex's product, but Celotex could not affirmatively negate such exposure. This Court held that under these circumstances the inability of Celotex to disprove exposure did not prevent it from obtaining a summary judgment. Summary judgment was proper because Celotex had put exposure in issue by its motion and the plaintiff had failed to produce any evidence of exposure.

There is no indication in *Celotex* that this Court intended to overrule the *Adickes* requirement that the movant make an initial showing that there is no genuine issue of material fact. Indeed, this Court made it plain that this burden remains:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion,

> and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.
>
> 106 S.Ct. at 2553.

The court of appeals' reading of *Celotex* in this case is incorrect. There is no suggestion in *Celotex* that this court intended to hold that *any* motion for summary judgment, on *any* grounds, shifts to the nonmovant the burden of proving his whole case. If *Celotex* had used the rationale of the court of appeals in this case, the motion for summary judgment would have required the plaintiff to prove not only exposure but negligence or a product defect.

Ironically, the proper reading of *Celotex* is found in another decision of the Eleventh Circuit, *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). In *Clark, supra,* this court undertook a detailed analysis of the *Celotex* decision and concluded that *Celotex* did not change the general rule which requires a summary judgment movant to make a *showing* that there is no genuine issue of fact with regard to a particular issue. This Court noted that *Celotex* was an asbestos case in which the record showed that the plaintiff could not prove exposure to Celotex's products and Celotex could not prove non-exposure. Under these facts, the *Clark* court noted:

> The Court held that in the unusual situation presented in *Celotex*, where neither party could prove either the affirmative or the negative of an essential element of the claim – exposure to Celotex's products – Celotex had met its burden

> by showing that Catrett would not be able to meet its burden of proof at trial.
>
> 929 F.2d at 607.

The court went on to hold that the district court had erred in finding that *Celotex* had altered basic summary judgment principles.

> We can surmise that the court believed *Celotex* changed the general rule so that under current summary judgment law whoever has the burden at trial (the plaintiffs here) has the burden on summary judgment. As we have pointed out, that is *not* the law." [Emphasis in original].
>
> 929 F.2d at 608.

It is plain that under a proper interpretation of *Celotex*, Tipton was not required to prove negligence because Siegen and Herne did not identify portions of the record which demonstrated the absence of negligence. They pointed out portions of the record showing that they were in the steel pipe manufacturing business, not the machine manufacturing business, and that they had elements of common ownership with Tipton's employer, Berg Steel Pipe Corporation. *Siegen and Herne never negated, even by bare averment,* the amended complaint's description of the accident, its allegation that they had been negligent after delivery or its allegation that such negligence caused Tipton's injuries.[2]

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[2] The opinion below accurately described Siegen and Herne's position as follows:

> Siegen and Herne . . . argued that their design of BSPC's sizer machine was, in effect, only for "in-house" use. As so characterized, they contended,

This Court needs to speak clearly on the issue of what evidence the non-moving party must produce to defend a motion for summary judgment. A recent study found that in 59 of 98 cases in which summary judgment was entered against the party having the burden of proof,

> The district court granted summary judgment without any discussion of the sufficiency of the defendant's production in support of the summary judgment motion. Moreover, the courts in 12 of these cases did not discuss any evidence or documentation introduced by defendants in support of the summary judgment motion; instead, they based awards solely on the perceived insufficiency of the plaintiff's production. Issacharoff and Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 92 (1990).

The law in this area needs to be clarified so that nonmovants can know what they must do to oppose summary judgment. It is neither fair nor rational to require a party to respond to contentions which his opponent has not even made.

Respectfully submitted,

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any theory of products liability against Siegen and Herne must fail because Florida clearly requires the manufacturer to be in the business of and gain profits from distributing and selling the product in question through the stream of commerce. [Footnotes omitted] 965 F.2d at 997.

Donald Lee TIPTON, Linda Tipton, his wife, Plaintiffs-Appellants.

v.

BERGROHR GMBH-SIEGEN, a German Corp., Bergrohr GMBH-Herne, a German Corp., Defendants-Appellees,

G.L. Rexroth GMBH, a German Corp., Defendant,

S.E. "Siggy" Kochle and H.L. Goode, Third-Party Defendants.

No. 90-3677.

United States Court of Appeals, Eleventh Circuit.

July 8, 1992.

Rehearing and Rehearing En Banc Denied Sept. 4, 1992.

Employee who was injured when an arm of sizer machine opened early and a roller fell out and crushed his foot brought action against the designers and manufacturers of the machine, alleging, inter alia, negligence. The United States District Court for the Northern District of Florida, No. PC 87-50148RV, C. Roger Vinson, J., granted summary judgment in favor of manufacturers and designers, and employees appealed. The Court of Appeals, Tjoflat, Chief Judge, held that evidence failed to support finding that manufacturers and designers were negligent.

Affirmed.

William A. Bald and Stephen J. Pajcic, III, Jacksonville, Fla., for plaintiffs-appellants.

Lynn C. Higby, and Harry L. Harper, Bryant, Higby & Williams, Panama City, Fla., for Bergrohr GMBH-Siegen and Bergrohr GMBH-Herne.

Appeal from the United States District Court for the Northern District of Florida.

Before, TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and HENDERSON, Senior Circuit Judge.

TJOFLAT, Chief Judge:

The district court granted appellees summary judgment in this products liability and negligence action,[1] concluding that appellants had failed to present a triable issue of fact for the jury. We agree that appellants have no case, and affirm.

I.

On June 30, 1987, Donald Tipton brought this action[2] against the two German corporations, Bergrohr GMBH-Siegen (Siegen) and Bergrohr GMBH-Herne (Herne), that designed the "sizer" machine[3] at the Berg Steel Pipe Corporation (BSPC) in Panama City, Florida. His complaint alleged that on August 13, 1986, as Tipton was standing near the sizer machine to assist in changing its several-ton rollers, the sizer's arms opened before the roller was secured to the crane and, as a result, the roller

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[1] This action began in Florida circuit court and was removed to the district court. *See* 28 U.S.C. § 1441 (1988).

[2] Tipton's wife, Linda Tipton, joined him as a party plaintiff, seeking consequential damages, *e.g.*, for loss of consortium. We refer to the Tiptons collectively as Tipton.

[3] A sizer machine straightens and rounds steel pipe.

fell out and crushed Tipton's foot. He brought two claims, each on a separate count, against Siegen and Herne: (1) the defendants were liable for the defective design and manufacture of the sizer machine,[4] and (2) the defendants were liable under negligence principles for their undertaking to ensure the safe operation of the sizer machine.[5]

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[4] Count I of the complaint alleged in pertinent part:

> 11. As designed and manufactured by [Siegen] and/or [Herne], the sizer was unreasonably dangerous to the user in the following respects:
>
> A. the sizer was equipped with controls which created an unreasonable risk that the control which opens the sizer arms would inadvertently be activated by the operator.
>
> B. The sizer was equipped with controls which created an unreasonable risk that the control which opens the sizer arms would be inadvertently left in an open position.
>
> C. The sizer was designed with controls which permitted the sizer arms to open upon the activation of controls intended to operate other parts of the sizer.
>
> D. The sizer was not equipped with any audible or visual warning system that would warn persons in the vicinity of the sizer that the arms were open or were about to open.
>
> E. The sizer lacked written warnings and operating instructions to warn the operator concerning the danger of opening the arms before the roller is secured to the crane.

In his memorandum opposing summary judgment, Tipton alternatively styled this claim under sections 395 (negligent design or manufacture) and 402A (strict liability) of the Restatement (Second) of Torts (1965). *See infra* n. 8.

[5] Count II of the complaint alleged in pertinent part:

> 15. After designing, manufacturing, assembling, selling and delivering the sizer, [Siegen]

The defendants' answer denied all of Tipton's allegations and, after two years of discovery, they moved the court for summary judgment on all counts. In support of their motion for summary judgment, the defendants presented the depositions of several executive officers of Siegen, Herne, and BSPC, who testified that Siegen and Herne were in the business of making steel pipe, not sizer machines.[6] In addition, they presented the affidavit of the chief financial officer of BSPC, John Peters, who stated that Siegen, Herne, and BSPC were all closely held corporations and subsidiary units of the larger Berg Family Estate and Trusts. Siegen and Herne therefore argued that their design of BSPC's sizer machine was, in effect, only for "in-house" use. As so characterized, they contended,

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> and/or [Herne] undertook to observe the sizer in operation at the Berg Steel Pipe plant and to make any adjustments or alterations necessary to insure [sic] the safe operation of said the [sic] sizer.
>
> 16. [I]n undertaking to make alterations and adjustments after delivery, [Siegen] and/or [Herne] had a duty to use reasonable care.
>
> 17. [Siegen] and/or [Herne] breached that duty. . . .

Count II of the complaint then proceeded to repeat the same five design defects listed in count I, para. 11, A-F, *see supra* n. 4, as evidence of the defendants' breach of duty to ensure the safe operation of the sizer machine. *See also infra* n. 9.

[6] The following persons testified that Siegen and Herne only built machines, which included the three sizers at Siegen, Herne, and BSPC, for "our own use"; Fitz Berg, chief executive officer of Siegen; Heinrich Berg, the technical manager of Siegen; Rudolph Sprey, the designer of the sizer at Herne and at BSPC, and the head of Herne's machine construction department; John Peters, the chief financial officer of BSPC. Tipton presented no testimony to the contrary.

any theory of products liability against Siegen and Herne must fail because Florida law clearly requires the manufacturer to be in the business of and gain profits from distributing and selling the product in question through the stream of commerce.[7] In this case, they concluded, Siegen and Herne were not in the business of selling or distributing sizer machines and, specifically, there had been no sale of the sizer, or its design, to BSPC.

In opposing summary judgment, Tipton argued that Siegen and Herne were liable as the designers of the sizer machine both under sections 395 and 402A of the Restatement (Second) of Torts (1965).[8] He did not contest that

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[7] Both parties conceded that Florida law governed this diversity action. Florida law has adopted three theories of manufacturer's liability; negligent design or manufacture, breach of implied warranty, and strict liability. In their motion for summary judgment, Siegen and Herne argued that Florida law required the injured party to show that the manufacturer was in the business of selling or distributing the product in question through the stream of commerce under all three theories of manufacturer's liability. *See, e.g., Lane v. International Paper Co.*, 545 So.2d 484, 486 (Fla.App. 1 Dist. 1989) ("On any theory of products liability, whether it be for negligent design or manufacture of the product, for breach of implied warranty, or strict liability, in order for the manufacturer to be liable the injured party must show that the manufacturer is in the business of and gains profits from the distribution and sale of the product through the stream of commerce."); *Johnson v. Supro Corp.*, 498 So.2d 528, 528-29 (Fla.App. 3 Dist.1986) (same).

[8] Section 395 of the Restatement (Second) of Torts provides in pertinent part:

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use

Florida law required the injured party to show that there had been a sale of the product in question; rather, he argued that because Siegen, Herne, and BSPC were separate corporations, and since the transfer of the design was for "an economic purpose" – not for Siegen's or Herne's own use – that the exchange of the sizer's design in this case was a "sale." Alternatively, Tipton argued that Siegen and Herne were liable under section 324A of the Restatement (Second) of Torts for their failure to use reasonable care in undertaking to ensure the safe operation of the sizer machine.[9]

> it . . . is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

Restatement (Second) of Torts § 395 (1965). Section 402A of the Restatement provides in pertinent part:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Restatement (Second) of Torts § 402A (1965); *see also West v. Caterpillar Tractor Co.*, 336 So.2d 80, 86 (Fla.1976) (adopting the strict liability doctrine of section 402A of the Restatement).

[9] Section 324A of the Restatement (Second) of Torts provides in pertinent part:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third

On May 25, 1990, the district court granted the defendants' motion for summary judgment. Accordingly to the court, the record clearly showed that there had been no sale of the sizer machine or its design. Furthermore, the court likened this case to the situation in which a company manufactures equipment for its own use, not for consumers; consequently, the court reasoned, under Florida's products liability law the defendants were not liable. The court therefore concluded that Tipton had failed

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person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm. . . .

Restatement (Second) of Torts § 324A (1965); *see also State of Florida, Depart. of Highway Safety v. Kropff*, 491 So.2d 1252, 1255 (Fla.App. 3 Dist.1986) (listing Florida cases adopting section 324A of the Restatement).

In opposing summary judgment, and again on appeal, Tipton attempted to reintroduce his negligent design claim against Siegen and Herne under section 324A of the Restatement (Second) of Torts, a "general" cause of action not requiring the sale of the product in question, in an effort, we believe, to avoid the burden of proving that there was a sale of the sizer or that Siegen and Herne were in the business of making sizer machines. Because under Florida law it is an essential element of a negligent design claim that the manufacturer be in the business of making the defective product in question, *see supra* n. 7, we construe the oblique mention of section 324A in Tipton's opposing memorandum properly to refer to the earlier allegation contained in count II of his complaint, to wit: that Siegen and Herne had undertaken to render the service (for BSPC) of ensuring the safe operation of the sizer machine, *see supra* n. 5.

to create a genuine issue of material fact regarding an essential element of his claims, and given no just reason for delay, the district court entered final judgment in favor of the defendants on July 17, 1990,[10] without ever addressing the issue of the defendants' alleged failure to ensure the safe operation of the sizer machine.[11] Tipton now appeals.

II.

A.

Our review of the district court's grant of summary judgment is plenary and is to be conducted utilizing the same legal standards as those imposed upon the district court. *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir.1990). The party moving for summary judgment bears

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[10] Tipton had amended his original complaint to include an additional German corporation as a defendant, G.L. Rexroth GMBH, the designer of the hydraulic valves for the sizer machine. The court therefore entered final judgment in favor of Siegen and Herne pursuant to Fed.R.Civ.P. 54(b) (1988).

[11] Perhaps the unartful language of Tipton's opposing memorandum, *see supra* n. 9, as well as the repetitive listing of the same design defects in both counts I and II of his complaint, *see supra* nn. 4 and 5, led the court to view the first count of the complaint as a products liability claim based on strict liability, and to view the second count as merely another products liability claim based on negligent design. As so construed, all of Tipton's claims failed for lack of the essential element of a "sale." *See supra* n. 7. To establish a claim based on general negligence principles, however, such as Tipton's claim that the defendants failed to use reasonable care to ensure the safe operation of the sizer, it is not necessary to establish a "sale." *See infra* part II B.

the initial burden of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). An issue of fact is "material" if it is a legal element of the claim, as identified by the substantive law governing the case, such that its presence or absence might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Once the moving party meets this initial burden, summary judgment is then appropriate as a matter of law against the nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552. In making a sufficient showing, the nonmoving party must "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e)). In opposing summary judgment, the nonmoving party may avail itself of all facts and justifiable inferences in the record taken as a whole. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962).

In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2513. Instead, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970)). If, so reviewed, a rational trier of fact could find a verdict for the nonmoving party under the substantive evidentiary standard, the nonmoving party can defeat summary judgment. *Id.* U.S. at 252, 106 S.Ct. at 2512.

B.

With these legal standards in mind, the sole issue worthy of our extended consideration[12] is whether the district

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[12] On appeal, Tipton also claims that the district court erred in finding that the transfer of the sizer's design was not a sale but, rather, only for "in-house" use. He argues that Florida law treats separate corporations as separate legal entities and that Siegen, Herne, and BSPC are separate corporations. he therefore contends that the exchange of the sizer's design from Siegen and Herne to BSPC, in passing from one separate corporation to another, took place in the stream of commerce. As so viewed, he concludes, Siegen and Herne are liable under Florida's products liability law for their negligent design of the sizer machine.

Even if we assume that the transfer of the sizer's design took place in the stream of commerce, Tipton still has made no showing of the essential element in all products liability claims under Florida law, to wit: that the manufacturer *"is in the business of and gains profits from"* distributing or selling the product in question. *See Lane*, 545 So.2d at 486 (emphasis added); *Supro*, 498 So.2d at 529; *West*, 336 So.2d at 86. All the evidence in the record confirms that Siegen and Herne were in the business of

court properly could have found Siegen and Herne negligent for failing to ensure the safe operation of the sizer machine. Tipton has the burden of proof at trial of showing the following elements: (1) that Siegen and Herne assumed the duty to ensure the safe operation of the sizer machine, (2) that they failed to use reasonable care in performing that duty, and (3) that their failure was the proximate cause of Tipton's injuries or "increase[d] the risk of such harm," *see supra* note 9. Each element is essential to Tipton's negligence claim and in making a sufficient showing on each element for the purposes of defeating summary judgment, Tipton cannot rest on the allegations in his complaint.

The record viewed as a whole and in the light most favorable to Tipton, however, does not present a scintilla of reliable evidence as to how the accident occurred. First, the record does not contain an eyewitness account of how the accident happened; neither Donald Tipton, nor his co-worker on the sizer machine, were deposed. Second, the record contains no depositions, no affidavits, no answers to interrogatories, and no admissions of fact, by any person with personal knowledge, setting forth such facts as would be admissible as evidence, *see* Fed.R.Civ.P. 56(e), concerning how the accident took place or describing what adjustments or alterations, if

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making steel pipe, not sizer machines, *see supra* n. 6. In sum, whether the district court's finding that the exchange of the sizer's design was not in the stream of commerce is correct is irrelevant to the correctness of the court's further finding, with which we agree, that Tipton's negligent design claim fails because he made no showing that Siegen and Herne were in the business of making sizer machines.

any, Siegen and Herne made, or should have made, to ensure the safe operation of the sizer machine.

The only account of the accident, besides the account alleged in Tipton's complaint, comes from Tipton's employer, S.E. Koelhe. Koelhe testified in his deposition that BSPC's investigating committee concluded that the accident was caused by the activation of the hydraulic valve, which opens the pins holding the upper roller, before the roller was properly secured to its holding crane as required by the company's roller-change procedures. Koelhe's account, of course, is rank hearsay and is not admissible as evidence. *See* Fed.R.Evid. 801, 802 (1990). Moreover, assuming for the sake of argument that it is admissible, Koelhe's testimony makes no mention of any adjustments or alterations that Siegen and Herne made, or should have made, to ensure the safe operation of the sizer.

It follows that without an admissible account in the record as to how the accident took place, even assuming *arguendo* that Siegen and Herne owed a duty to BSPC's employees to ensure the safe operation of the sizer machine, we have no way of knowing whether Siegen's and Herne's adjustments or alterations to the sizer, or the lack thereof, caused Tipton's injuries. In sum, without a reliable account of how the accident occurred, no reasonable trier of fact could find that Siegen and Herne breached a duty owed to Tipton or that their breach caused Tipton's injuries. Tipton therefore has failed to establish essential elements of his case, on which he bears the burden of proof at trial, and, accordingly, summary judgment is appropriate as a matter of law against him. *Celotex*, 477 U.S at 822, 106 S.Ct. at 2552.

III.

For the foregoing reasons, we affirm the district court's summary judgment.

IT IS SO ORDERED.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3677

DONALD LEE TIPTON,
LINDA TIPTON, his wife,

Plaintiffs-Appellants,

versus

BERGROHR GMBH-SIEGEN, a German Corp.,
BERGROHR GMBH-HERNE, a German Corp.,

Defendants-Appellees,

G.L. REXROTH GMBH, a German Corp.,

Defendant,

S. E. "Siggy" KOEHLE and
H. L. GOODE,

Third Party Defendants.

On Appeal from the United States District Court for the Northern District of Florida

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(Filed Sep. 4, 1992)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, DUBINA, Circuit Judge and HENDERSON, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

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* * *

11th Cir. R. 41-1 Stay or Recall of Mandate.

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion of rehearing in banc vacates the panel opinion and stays the mandate.

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion of rehearing in banc is also treated as a petition for a panel rehearing under 11th Cir. R. 35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing in banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court.

* * *

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DONALD LEE TIPTON and LINDA TIPTON,

Plaintiffs,

v.

Case No. 87-50148-RV

BERGROHR GMBH-SEIGEN, a German corporation, and BERGROHR GMBH-HERNE, a German corporation,

Defendants.

ORDER

On August 13, 1986, Donald Tipton was injured while assisting in the changing of a roller on the "sizer" machine[1] at the Berg Steel Pipe Corporation (BSPC) in Panama City, Florida. According to Mr. Tipton, the roller was released before it was properly secured by a cable. As a result, the roller fell out of the machine and injured Mr. Tipton's foot. Mr. Tipton and his wife, Linda Tipton, sued Bergrohr GMBH-Seigen, Inc. (Seigen), Bergrohr GMBH-Herne, Inc. (Herne), and G.L. Rexroth GMBH, Inc. The amended complaint alleges in Count I that the defendants are strictly liable for the defective design and manufacture of the sizer machine. In Count II, the plaintiffs allege that the defendants are liable under negligence

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[1] A sizer machine straightens and rounds steel pipe.

principles. Defendants Seigen and Herne have moved for summary judgment. (Doc. 59).

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R. Civ.P. An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

On a summary judgment motion, the record and all inferences that can be drawn from it, must be viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L.Ed.2d 176 (1962). Furthermore, the court must consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. *See Clinkscales v. Chevron USA, Inc.*, 831 F.2d 1565, 1570 (11th Cir. 1987).

The party who bears the burden of proof on a certain issue at trial also bears the burden of establishing that there are disputed facts with respect to that issue on a motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). If a party fails to make a showing sufficient to establish the

existence of an element essential to his case, then summary judgment should be entered against him. In this situation, there can be no "genuine issue of material fact," because a complete absence of proof on an essential element of that party's case renders all other facts immaterial. *Id.* at 322-23.

Under Florida law,[2] a manufacturer of a product is not liable to third parties injured by the product unless the manufacturer is "in the business of and gains profits from the distribution and sale of the product through the stream of commerce." *Lane v. International Paper Co.*, 545 So.2d 484 (Fla. 1st D.C.A. 1989) *cert. denied* 553 So.2d 1165 (Fla. 1989). *See generally West v. Caterpillar Tractor Co.*, 336 So.2d 80, 86 (Fla. 1976). *See also Johnson v. Supro Corp.*, 498 So.2d 528 (Fla. 3d D.C.A. 1986). This principle applies to any theory of product liability, including strict liability[3] and negligence. *See e.g. Lane v. International Paper, supra,* 545 So.2d at 486.

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[2] The parties agree that Florida law applies in this case.

[3] Professor Prosser has stated:

> As to strict liability, whether on warranty or in tort, no case has been found in any jurisdiction in which it has been imposed upon anyone who has not engaged in the business of supplying goods of the particular kind. The Second Restatement of Torts has so limited the liability. When a housewife, on one occasion, sells a jar of jam to her neighbor, or the owner of an automobile trades it in to a dealer, the under taking to the public and the justifiable reliance upon that undertaking on the part of the ultimate consumer, which are the basis of strict liability, are conspicuously lacking.

W. Prosser, The Law of Torts 664 (West 4th ed. 1971).

Defendants Seigen and Herne contend that they are entitled to summary judgment because they are not in the business of manufacturing and distributing the sizer machine, or any other industrial machinery: They are in the business of manufacturing steel pipe. Defendant Seigen also contends that it is entitled to summary judgment because it was not involved in the design, manufacture, or assembly of the sizer machine. The first issue here is whether Herne or Seigen was in the business of manufacturing and distributing sizer machines in the stream of commerce.

This case involves several different business entities owned and operated by various members of the Berg family. Prior to 1979, the Bergs owned two companies that manufactured steel pipes – Herne and Seigen. Berg Beteiligungs GMBH, a German holding company, owned 47.5% of Herne; Seigen owned 47.5% of Herne, and Hans Berg owned the other 5%. Herne was managed by the family of Hans Berg. Seigen was owned by the heirs of Dr. Erich Berg, who owned 52.5% of the company, and Hans Berg, who owned 47.5%. Seigen was managed by the family of Fritz Berg. Both of these companies, Herne and Seigen, manufactured their own machinery for use in the production of steel pipe. Neither company was in the business of manufacturing industrial machinery for sale or distribution to other steel pipe manufacturers. In 1977, Hans Berg began planning to form a third company to manufacture steel pipe. In 1979, BSPC was formed. Berg Beteiligungs, GMBH owned 60% of it.

Defendant Herne admits that it designed the sizer machine and assisted in its assembly at the BSPC plant. The BSPC sizer machine was a larger version of the sizer

machine used at Herne. According to defendant Herne, however, it did not sell the machine to BSPC: Herne designed and assisted in the assembly of the sizer machine, and other equipment used at BSPC, to promote its own business interests, and the business interests of the Berg family.

With regard to Seigen's role in the design and assembly of the sizer machine, Fritz Berg, chief executive officer of Seigen, testified by deposition that Seigen assisted in the construction of the BSPC plant and organized the shipment of the equipment for the company. Seigen did not, however, according to Fritz Berg, design or assemble the sizer machine. Werner Deutcher, a technician employed by Herne, testified by deposition that someone at Seigen made the decision that both of the motors on the sizer machine would be controlled hydraulically. This testimony suggests that Seigen may have played at least a minimal role in the design of the sizer machine. The record also indicates that employees of Seigen were present at the assembly of the sizer machine at BSPC. In any event, the degree of Seigen's participation in the design or assembly of the sizer machine does not resolve the issue of whether Seigen was in the business of manufacturing or distributing sizer machines.

The plaintiffs contend that Herne and Seigen were in the business of manufacturing and distributing the sizer machine, and that, therefore, these companies may be held liable under principles of product liability. The plaintiffs rely primarily on the fact that Herne and Seigen

are corporate entities separate and distinct from BSPC.[4] The defendants maintain that they are not in the business of manufacturing or distributing sizer machines except for the three machines made for use in their own steel pipe manufacturing businesses.

I agree with the defendants. The record is clear that the companies involved in this case share capital, are related businesses, and are operated as a family enterprise. Although I have not found any caselaw addressing this issue in the context of closely held, but separate, business entities, this case is analogous (if not identical) to the situation where a company manufactures equipment for its own in-house use. Under Florida law, a company that manufactures its own equipment for in-house use is not liable under principles of product liability. *See Lane v. International Paper Co., supra; Johnson v. Supro Corp. supra.* I conclude that the same rule applies in this case. The plaintiffs have failed to create a genuine issue of material fact regarding an essential element of their claims against Herne and Seigen. Therefore, defendants Seigen's and Herne's motion for summary judgment is GRANTED and partial summary judgment shall be entered in favor of defendants Herne and Seigen, with taxable costs.

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[4] The plaintiffs, however, have not cited any cases addressing this issue in the context of closely held, family owned corporations. The only case cited by the plaintiffs, *Gulfstream Land & Development Corp. v. Wilkerson*, 420 So.2d 587 (Fla. 1982) is not a products liability case.

DONE AND ORDERED this 25th day of May, 1990.

/s/ Roger Vinson
ROGER VINSON
United States District Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DONALD LEE TIPTON and
LINDA TIPTON, His Wife,

Plaintiffs,

vs.

CASE NO: 87-50148/RV

BERGROHR GMBH-SEIGEN, a German corporation, and
BERGROHR GMBH-HERNE, a German corporation,

Defendants.

MOTION FOR SUMMARY JUDGMENT

Defendants, BERGROHR GMBH-SEIGEN (hereinafter "Seigen") and BERGROHR GMBH-HERNE (hereinafter "Herne"), pursuant to Rule 56(b), Federal Rules of Civil Procedure, respectfully move the Court for a summary judgment upon the grounds that the pleadings, depositions, answers to interrogatories, admissions on file and affidavits show that there is [illegible] genuine issue as to any material fact and that these Defendants are entitled to a judgment as a matter of law.

Memorandum of Law

This is a product liability case involving alleged defects in the hydraulic control system of a pipe manufacturing machine known as a "sizer" alleged to have

been designed by Seigen and Herne with the hydraulic control system for the sizer to have been designed by G.L. Rexroth GmbH.

The Amended Complaint contains two counts which allege that the Plaintiff, Donald Lee Tipton, was injured on August 13, 1986, while working in a steel pipe fabrication plant owned and operated by his employer, Berg Steel Pipe Corporation (hereinafter "BSPC") and that the accident occurred when the sizer arms opened before the sizer roller was secured to a crane causing the roller to fall out of the machine and strike Tipton.

Count I seeks recovery under Section 402A of the Restatement of Torts in strict liability and alleges:

> "A. The sizer was equipped with hydraulic controls which created an unreasonable risk that the control which opens the sizer arms would inadvertently be activated by the operator;
>
> B. The sizer was equipped with hydraulic controls which created an unreasonable risk that the control which opens the sizer arms would be inadvertently left in an open position;
>
> C. the sizer was designed with hydraulic controls which permitted the sizer arms to open upon the activation[sic] of controls intended to operate other parts of the sizer;
>
> D. The sizer was not equipped with any audible or visual warning system that would warn persons in the vicinity of the sizer that the arms were open or were about to open; and

E. The sizer lacked written warnings and operating instructions to warn the operator concerning the danger of opening the arms before the roller is secured to the crane."

Count II contains identical allegations and alleges that the Defendants Seigen, Herne and Rexroth were negligent.

The Standard for Summary Judgment

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. An issue of fact is "material if it might effect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202, 212 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). On a summary judgment motion, the record, and all inferences that can be drawn from it, must be viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). Furthermore, the court must consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. *Clinksgales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1570 (11th Cir. 1987); *Keiser v. Coliseum Properties*, 614 F.2d 406, 410 (5th Cir. 1980).

Statement of Undisputed Facts

The sizer machine alleged to be defective was designed by Fritz Rudolph Sprey, an engineer in the employ of Herne. It is a copy of the sizer machine in Herne which "only builds machines for our own use". (Depo. Rudolph Sprey, pp. 4-8, attached). Seigen had nothing to do with the design of the sizer. (Depo. Fritz Berg, pp. 24, 25, attached). Neither Seigen or Herne builds equipment for anyone other than themselves or BSPC. (Depo. Heinrich Berg, pp. 6, 11, 17, 18, attached). Neither Seigen or Herne had anything to do with the issuance of instructions for the use of the sizer machine or the roll change procedure. (Depo. S. E. "Siggy" Koelhe, President BSPC, pp. 19, 20, 22, attached).

Finally, and most significantly, it is not now, nor has it ever been the business of either Herne or Seigen to design, manufacture, produce, distribute or sell in the stream of commerce the "sizer" machine in question. Additionally, it has always been the business of Herne and Seigen to manufacture, distribute and sell steel pipe of various sizes. (Affidavit of John E. Peters, pp. 2, original attached).

The Law

It is, of course, elemental that any recovery by the Plaintiff, Donald Lee Tipton, against the Defendants Herne and Seigen is governed by the law of the state of Florida.

Over thirteen years ago the Florida Supreme Court in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976)

adopted Section 402A of the A.L.E. Restatement (Second) of Torts which provides:

> "§ 402A Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> 1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
>
> a. The seller is engaged in the business of selling such a product, and
>
> b. It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> 2. The rule stated in subsection (1) applies although:
>
> a. The seller has exercised all possible care in the preparation and sale of his product, and
>
> b. The user or consumer has not bought the product from or entered into any contractual relation with the seller." [Emphasis Supplied]

Two recent Florida cases would appear instructive to the issue posed by the Defendants' Motion for Summary Judgment. Both cases involve an "assembler" and therefore a "manufacturer" of industrial equipment for "in house" use.

Johnson v. Supro Corporation, 498 So.2d 528, involved a "ribbon blender" that Supro had purchased in 1966. In 1970, Supro, which was engaged in manufacturing dry wall products, added a platform and grading to the machinery and in 1976, sold its entire operation including

the blender to F. R. M., Inc. On July 1, 1984, Johnson fell from the grading and was injured. In his suit, he alleged that the accident had been caused by defects in the changes of the equipment Supro made in 1970. His claims were based on *negligent* manufacture, breach of implied warranty and strict liability. He suffered a summary judgment below and the Third District Court of Appeal affirmed the lower court stating:

> "Even though Supro may be regarded for some purposes as the "assembler" and therefore the "manufacturer" of the piece of equipment it rebuilt, see *A. E. Finley & Associates, Inc. v. Medley*, 141 So.2d 613 (Fla. 3d DCA 1962), cert. denied, 148 So.2d 279 (Fla. 1962), it cannot be held liable in this case even if the adaptation had been improperly effected. This is because every theory of products liability inuring to the benefit of third persons like Johnson-from that of negligent manufacture which effectively originated in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), through breach of implied warranty, see *Toombs v. Fort Pierce Gas Co.*, 208 So.2d 615 (Fla. 1968), to and including the strict liability doctrine of section 402A of the Restatement of Torts as adopted in Florida by *West V. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976)-is based on the essential requirement that the responsible party is in the business of and gains profits from distributing or disposing of the "product" in question through the stream of commerce" [Emphasis Supplied]

The Court went on to state further:

> "It is clear that Supro does not fall within this rule. It was in the business of manufacturing dry wall products *with* the machine which it

adapted for that very use and purpose; it was decidedly not in the business of manufacturing and distributing the machine itself."

More recently, we find the case of *Lane v. International Paper Company*, 14 FLW 1520 (1st DCA Opinion, June 22, 1989).

Since this opinion is yet to be reported in the advance sheets, a copy is attached for the Court's information. Of course, Plaintiff's counsel is intimately familiar with this case since both Plaintiff's counsel were co-counsel to Plaintiff in the *Lane* case.

As stated by the First District Court of Appeal:

"With respect to the complaint, the court held that although IPC manufactured the broke conveyor, Lane could not recover because IPC was not in the business of manufacturing and selling broke conveyors.

At the time the broke conveyer was designed and constructed IPC was in the business of producing, distributing and selling paper. The broke conveyor was constructed for use in its business for selling or producing paper. It was not in the business of manufacturing, distributing or selling broke conveyors. The only time the broke conveyor was sold prior to the accident was when the entire paper mill, including the broke conveyor, was sold to SFI in 1979. On any theory of products liability, whether it be for negligent design or manufacture of the product, for breach of implied warranty, or strict liability, in order for the manufacturer to be liable the injured party must show that the manufacturer is in the business of and gains profits from the distribution and sale

of the product through the stream of commence." [Emphasis Supplied]

Conclusion

Seigen is entitled to a summary judgment because it had absolutely *nothing* to do with the design, manufacture, sale, assembly, or installation of the "sizer" machine.

Herne is entitled to a summary judgment because it is not now nor has it ever been in the business of designing, manufacturing, distributing, or selling for profit, "sizer" machines in the stream of commerce.

Certificate of Counsel Conferal

I HEREBY CERTIFY that I have conferred with counsel for the Plaintiff in a good faith effort to resolve by agreement the issues raised in the foregoing Motion for Summary Judgment and Plaintiff's counsel does not agree.

Certificate of Service

I HEREBY CERTIFY that copy of the foregoing has been furnished to William A. Bald, Attorney for Plaintiffs, 2900 Independent Square, Jacksonville, Florida, 32202; Steven J. Pajcic, Attorney for Plaintiffs, 2800 Independent Square, Jacksonville, Florida, 32202; and Robert D. Bell,

Attorney for Defendant Rexroth, P.O. Box 12564, Pensacola, Florida, 32573-2564, on this 8th day of September, 1989.

BRYANT, HIGBY & WILLIAMS

By: /s/ Lynn C. Higby
Lynn C. Higby, Esq.
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Florida Bar No. 035884

ATTORNEY FOR DEFENDANTS BERGROHR GMBH-SEIGEN AND BERGROHR GMBH-HERNE

DEPOSITION–S.E. "SIGGY" KOELHE

Pages 19, 20 & 22

* * *

you had a subsequent meeting?

A. The, I, I cannot recall exactly in every detail what happened two years ago, but I know I made an investigation, and part of the investigation was to see how it could happen that the roll fell out.

Q. Who told you that it had been an operator error that had caused the roll to fall out?

A. It was, looking at the techniques, the way the sizer is built, it only can fall out when you're not following the roll changing procedure.

Q. Well, I guess, are you saying that's your conclusion or is that a conclusion that someone reported to you?

A. All together, a group of people, we concluded that.

Q. You refer to the roll change procedure. Let me show you a document which has also been produced by Berg Steel Pipe entitled Standard Practice Pipe Production, Berg Steel Pipe Corporation, subject, Sizer Roll Change Procedure dated June 24, 1982, is that the document that you're referring to?

A. Yes.

Q. The roll change procedure?

A. Yes.

Q. What is it in your mind that was not followed [p. 20] about the roll change procedure? What part of the roll change procedure was not followed?

A. The valve was activated to open the stand before the sizer roll was hanging on the crane? The top roll of the sizer was supposed to hang on the crane before you activate the valve or the safety pins and the opening of the stand.

Q. It is supposed to be, the roll that is being removed is supposed to be attached by a steel cable to the crane?

A. A steel cable, it's exactly referred here in the changing procedure. This is reversed, this page here.

Q. That says it's three out of eight. I may be able to help you.

A. There's a sentence written, exactly, attach–check cable first and then attach it to the, hang roll on the crane and make sure the cable is tight.

Q. Is that item J?

A. Yes. Here it is, remove existing roll continued. Let out the valves, move top motor coupling out, the motor couplings are also moved out via hydraulic.

Q. All right, let me ask you some questions. I think it will, it will work better, I'm not sure it's going to be clear if we're doing it this way. I'd like to mark –

MR. HIGBY: Let me see that just a second. I

* * *

[p. 22] was all the time there or it was due to making copies, I don't know.

Q. Had you looked at this roll change procedure before August 13, 1986?

A. I must have looked at it in 1982 when it was written, because I was the one that was, made the plant superintendent put in writing machine operating procedures for all the machinery.

Q. When you came to Berg Steel Pipe, was there a written operating procedure or manual or other similar document for the sizer?

A. Not as far as I know.

Q. You then, what you're saying is you instructed that people prepare written procedures for certain machines including the sizer?

A. Every machine

Q. Were there written procedures for any of the other machines when you came besides the sizer?

A. I cannot answer this question 100 percent, it could be since there were some there. I wanted, just in order to get the plant organized, to have written procedure by the plant superintendent and foreman for every machine, how it's operated, and I looked on it and I found nothing wrong, and that's the way it goes.

Q. Getting back to your investigation of the accident.

* * *

DEPOSITION – HEINRICH BERG

Pages 6, 11, 17, 18

* * *

[p. 6] Q. Is any such license available in Germany?

A. No. Those licenses don't exist. You get your certificate, you diploma from the polytechnic or university that you studied at.

Q. Is your diploma the highest form of engineering degree that can be received in Germany?

A. You can go ahead and have a doctor's degree in engineering.

Q. If you know, is you diploma the equivalent of what we would have in America as a university engineering degree?

A. I can't tell you, I'm sorry.

Q. Getting back to the Panama City plant, were you asked to do anything relating to the design of any equipment to go into that plant?

A. No.

Q. Were you asked to do anything regarding the assembly of any of the production equipment in Panama City?

A. No.

Q. Are you familiar with a machine known as the sizer in Panama City?

A. Yes.

Q. Do you know who designed the sizer that was installed in the plant in Panama City?

* * *

[p. 11] Q. Who assembled the sizer machine?

A. Berg Steel Pipe and Bergrohr-Herne.

Q. What employee or employees of Bergrohr-Herne supervised the assembly of the sizer machine in Panama City?

A. There was a master electrician and a master hydraulic expert, but I don't remember the names. Please excuse me.

Q. But both the electrician and the hydraulic expert were employees of Bergrohr-Herne?

A. Yes.

Q. Were any other employees of either Bergrohr-Herne or Bergrohr-Siegen present during the installation of the production equipment besides you, the electrician and the hydraulics man?

A. There was also an electrician from Bergrohr-Siegen and various people concerned with the assembly and also from the companies that had done other machines like the company Wagner in Dortmund.

Q. Was Mr. Sprey present in Panama City during the assembly or installation of any of the production equipment?

A. No.

Q. Was there an employee of Berg Steel Pipe named Gary Cable present during the installation and

* * *

[p. 17] how to make pipe?

A. That was, of course, the operator, Gary Cable, and someone else, Dave so and so.

Q. When did you learn that there had been an accident involving the sizer in Panama City that occurred during a roll-change procedure?

A. I think last year.

Q. Are you aware of any tests that were done at Herne to try to determine under what conditions a roll would fall out of the sizer?

A. No.

Q. Have you talked to any of the Berg Steel Pipe employees about the accident that occurred during a roll change in 1986?

A. No.

Q. How long have you done your present job with Bergrohr-Siegen?

A. Since 1970.

Q. Who is in charge of constructing the production equipment used at Siegen?

A. That's a technical office position, that's a literal translation, and I'm responsible for that and another colleague, Mr. Martin.

Q. Does Bergrohr-Siegen build its equipment and Bergrohr-Herne build its equipment or does sometimes [p. 18] one company build equipment for the other?

A. No, each builds their own equipment.

Q. Does either company ever build equipment for some other firm with the exception of Berg Steel Pipe?

A. No.

Q. Were you involved in the planning of what production machinery to use in Panama City before the plant was constructed?

A. No. That was done before we got involved with the project.

Q. And by we, you mean Bergrohr-Siegen?

A. Yes.

Q. Whose employees did the actual physical assembly of the production equipment in Panama City?

A. Those were the employees of Berg Steel Pipe or the employees of respective production companies in Germany.

Q. Did Vetter send any employees to Panama City to assist in the assembly of the sizer?

A. No.

Q. Did Berg Steel Pipe hire any American firm to assist in the assembly of the machinery?

A. Not for the sizer and the other machines. I don't think so.

Q. So, to the best of your knowledge, the sizer

* * *

DEPOSITION–FRITZ BERG

Pages 24 & 25

* * *

[p. 24] which those questions refer.

Q. Let's assume they refer to the sizer.

A. That must be Bergrohr-Herne.

Q. What type of questions would an employee of Bergrohr-Siegen be called on to answer if they were asked?

A. If some anchor bolts are wrong, if there are some channels for cables for pipes and the layout doesn't meet the necessities, things like that.

Q. Have you talked to Mr. Koehle about the sizer accident in 1986?

A. Mr.–

MR. CLEMONS: Who?

BY MR. BALD:

Q. Sigmund Koehle?

A. No.

MR. BALD: No further questions.

MR. BELL: No questions.

CROSS EXAMINATION

BY MR. CLEMONS:

Q. Mr. Berg, just a couple or questions just so we're clear on this. As I understand it, Bergrohr-Siegen did not design the sizing machine in Panama City?

A. Yes.

[p. 25] Q. That's correct?

A. Yeah.

Q. And you didn't assist Bergrohr-Herne in the design of that machine?

A. Correct.

Q. And you were not involved in the construction of that sizer machine; is that correct?

A. Correct.

MR. CLEMONS: Nothing further.

MR. BALD: I have nothing further. Dr. Berg, do you declare that the testimony you've given today has been true, to the best of your knowledge?

THE WITNESS: Yes, sir.

MR. BALD: Thank you very much.

(Witness excused)

(And, whereupon, the taking of the deposition was concluded at 10:10 o'clock, a.m.)

* * *

DEPOSITION–RUDOLPH SPREY

Pages 4 through 8

[p. 4] BY MR. BALD:

Q. Let us begin. Sir, would you first state your full name.

A. Fritz Rudolf.

Q. And your last name?

A. Sprey

Q. Where do you live?

A. In Dattein.

Q. Where are you employed?

A. Bergrohr-Herne

Q. What is your job with Bergrohr-Herne?

A. I'm in charge of the construction department.

Q. Would you explain that more fully? What construction are you in charge of ?

A. Well, for our company we build machines ourselves, and there are a couple of people who are involved in the construction, and I'm head of them all.

Q. What type of machines does your company build?

A. Well, we only build machines for our own use, and for the production of the pipes. You probably know it.

Q. Steel pipe?

A. Yes, steel pipe.

[p. 5] Q. Large diameter steel pipe for oil pipeline

A. Yes, the pipes that we build have a diameter starting from 500 millimeters right up to now lately 1600 millimeters.

Q. Do I understand that you are in charge of the making of pipe at Herne?

A. Well, I'm in charge of the construction, not the production .

Q. Does construction mean the building of machines to make pipe?

A. Yes.

Q. How long have you held your present job?

A. 23 years.

Q. How old are you, sir?

A. 60.

Q. Briefly, what jobs did you hold before you gained your present position 23 years ago? -

A. Beforehand, I had roundabout the same position with Mannes-Mann. Before I had the Mannes-Mann post, I worked for what is now called Tuson and I had the job of slossit, it's called in German.

THE INTERPRETER: Does anyone know what it is in English?

MR. JANSSEN: Locksmith. Fitter mechanic, I think. Fitter mechanic is better.

[p. 6] BY MR. BALD:

Q. Do you build machines for use in all of the Bergrohr factories in Germany or just the one in Herne?

A. For all of them, with the exception of the Siegen plant.

Q. How many plants are there in Germany, Bergrohr plants?

A. Three.

Q. One is at Herne, one is at Siegen and where is the third?

A. Two in Herne.

Q. Are there sizer machines in both of the plants in Herne?

A. No, only in one of them.

Q. Were you in charge of building the sizer machine that is in Herne?

A. Yes.

Q. When was that machine built?

A. It was long before the USA one was built, but I can't remember the exact date.

Q. Did you design the sizer in the Herne plant?

A. Yes.

Q. What is your educational background, sir?

A. I went to so-called middle school in Germany which is not quite a grammar school. Then I was [p. 7] trained as a craftsman. Then I visited training school to become a technician.

Q. Do you hold any degrees or certificates showing that you have a certain type of training or education?

A. Well, from all the schools that I've mentioned, the middle school, the craftsman school and the evening school I do, of course, have reports and notifications or diplomas or whatever you call them.

Q. Is there in Germany what we would call an engineering license or something similar?

A. Well, I can't really say that exactly. There are, of course, some engineers that hold more of an advisory position, and I suppose they will have a sort of special license to be able to do this counseling or advising service.

But other than that, it's usually enough to have a certificate to prove that you're an engineer or technician to hold a specific post.

Q. Do you consider yourself to be an engineer?

A. Yes.

Q. When you designed the sizer in Herne, did your design include the design for the roll-change procedure?

A. Yes.

* * *

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DONALD LEE TIPTON and
LINDA TIPTON, His Wife,

Plaintiffs,

vs. CASE NO: 87-50140/RV

BERGROHR GMBH-SEIGEN, a
German corporation, and
BERGROHR GMDH-HERNE, a
German, corporation,

Defendants.

_____/

AFFIDAVIT

STATE OF FLORIDA,

COUNTY OF BAY.

BEFORE ME, the undersigned authority, duly authorized to take acknowledgments and administer oaths in the County and State aforesaid, this day personally appeared JOHN E. PETERS, who after being by me duly sworn, deposes and says:

1. That I am over the age of eighteen years, sui juris, have personal knowledge of the matters hereinafter related and otherwise competent to testify.

2. I am Vice President-Finance, Secretary-Treasurer and Chief Financial Officer of Berg Steel Pipe Corp. (BSPC), a position I have held since 1982. I was originally Comptroller and have been the Chief Financial Officer of BSPC since August, 1979.

3. The financial ownership interest in the form of corporate stock was held or owned by corporations, individuals or trusts as reflected on the dates indicated on the schedule attached hereto marked Exhibit "A".

4. At all times material to this case, Bergrohr GmbH-Herne (Herne), Bergrohr GmbH-Seigen (Seigen), and BSPC are and have been in the business of manufacturing, distributing and selling steel pipe of various sizes.

5. Herne, Seigen and Berg Beteiligunge GmbH have never been in the business of, nor have they gained profits from, the design, manufacture, production, distribution or sale of industrial machinery or equipment through the stream of commerce, in general, and the "sizer" machine in particular.

6. Any industrial machinery or equipment that they have designed or had designed or manufactured for them, has been for their own proprietary use and consumption in the manufacture of steel pipe.

7. The component parts which make up the sizer, were ordered for BSPC principally by Berg Beteiligunge GmbH, a German holding company and 60% owner of BSPC and to a lesser degree by both Herne and Seigen, two German pipe manufacturers owned in part by Berg Beteiligunge GmgH and by family members and family trusts.

8. The component parts (hydraulic, electrical, mechanical) were purchased from fifteen separate vendors in Germany and elsewhere and were, after delivery here, assembled by BSPC employees, contract labor and

employees of Herne and Seigen during the early months of 1980.

9. A listing identifying vendor names and the functional nature of the component parts which they supplied is attached hereto and marked Exhibit "B".

10. Depending upon who the supplier invoiced, payments by BSPC were either made directly to the respective German supplier or in the case where the supplier billed Berg Beteiligungs GmbH or Herne, BSPC ultimately reimbursed these two companies.

Further, affiant sayeth naught.

/s/ John E. Peters
John E. Peters

SWORN TO and subscribed before me this 7th day of September, 1989.

/s/ Illegible
Notary Public

My commission expires:

Notary Public, State of Florida at Large
By Bergrohr Expires June 30, 1991

EXHIBIT A

ENTITY OWNERSHIP STRUCTURES

	January 1, 1980	August 13, 1986	July 1, 1989
(A) BERG STEEL PIPE CORP.			
BERG BETEILIGUNGS GmbH, a German holding company	60.0%	.6%	–
MOUNTAIN HOLDING COMPANY, an Iowa corporation	40.0%	.4%	–
BERG PIPE, INC., a Delaware corporation	–	99.0%	–
BERGROHR GmbH HERNE, a German corporation	–	–	50.0%
DAVAL INVESTORS, INC., a New York corporation	–	–	50.0%
(B) BERG BETEILIGUNGS GmbH			
GEBR. BERG OHG, SIEGEN	60.0%	60.0%	–
HANS BERG, HERTEN	20.0%	20.0%	50.0%
TRUST BENEFICIARIES, (heirs) of Dr. Erich Berg, Siegen	20.0%	20.0%	–
A.G. der DILLINGER HÜTTENWERKE, a German corporation	–	–	50.0%
(C) MOUNTAIN HOLDING COMPANY			
INTERCONTINENTAL METALS CORP. of Charlotte, N.C. (Bankrupt)	ownership distribution unknown		
FRED HERLITZ, a resident of New York			
(D) BERG PIPE, INC.			
BERGROHR GmbH HERNE	–	67.0%	–
DAVAL INVESTORS, INC.	–	33.0%	–
(E) BERGROHR GmbH HERNE			
BERG BETEILIGUNGS GmbH	47.5%	25.0%	49.75%
BERGROHR GmbH SIEGEN	47.5%	25.0%	–
HANS BERG, HERTEN	5.0%	–	–
A.G. der DILLINGER HÜTTENWERKE	–	50.0%	50.25%
(F) DAVAL INVESTORS, INC.			
A.G der DILLINGER HÜTTENWERKE	N/A	N/A	50.0%
FRANCOSTEEL	N/A	N/A	50.0%
(G) BERGROHR GmbH SIEGEN			
TRUST BENEFICIARIES, (heirs) of Dr. Erich Berg, Siegen	52.5%	52.5%	52.5%
HANS BERG, HERTEN	47.5%	47.5%	–
GEBR. BERG OHG, SIEGEN	–	–	47.5%

EXHIBIT B

SCHEDULE OF SUPPLIER ORGANIZATIONS

Supplier	Type of Component Parts
G. L. Rexroth GmbH, D-8770 Lohr/Main	hydraulic
Gustav Schmidt, Postfach 210463, 5900 Siegen 21	hydraulic
Fritz A. Seidel, Postfach 340161, 4000 Dusseldorf 3	electric
IHG & Co., Postfach 2250, 7100 Heilbronn	mechanical
IKL GmbH, Postfach 1442, 56547 Haan	electrical
Thyssen Giesserei A.G., Concordiahutte Postfach 1120, 5413 Bendorf (Rhein)	castings for machine foundation & rollers
Hagglunds GmbH, Postfach 1454, D-3012 Langenhagen	electrical motors
Stork Services B.V., Industrieplein 1 Postfach 2013, 7550 CA Hengelo (O), NETHERLAND	machining & finishing of rollers
Stober & Sohn OHG, Postfach 45, 5802 Wetter 4	electrical motors
Herbert Hanchen KG, Postfach 4140, D-7302 Ostfildern 1-Ruit	hydraulic
ZSM, Postfach 220, 7480 Sigmaringen	gears

Walter Eckhold GmbH & Co. KG, D-3424 St. Anderasberg-Sperrluttertal	hydraulic
Seppelfricke, Postfach 1480, 4650 Gelsenkirchen	parts [illegible]
Erwin Vetter, Postfach 310264, 5900 Siegen 31	machinery & assembly
Ingenieurburo Lortz & Bredendiek, Römerbrunnen 2, 4050 Mönchengladbach 2	design

NOTE: All firms are located in West Germany except as otherwise indicated.

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DONALD LEE TIPTON and
LINDA TIPTON, his wife,

Plaintiffs,

vs.

Case No.:
87-50148/RV

BERGROHR GMBH-SIEGEN, a
German corporation,
BERGROHR GMBH-HERNE, a
German corporation, and
G. L. REXROTH, GMBH, a
German corporation,

Defendants.

AMENDED COMPLAINT

Plaintiffs sue defendants and allege:

COUNT I

1. This is an action for damages that exceed $10,000.

2. Defendants Bergrohr GmbH-Siegen ("Bergrohr-Siegen" and Bergrohr GmbH-Herne ("Bergrohr-Herne") are and at all times material were corporations organized under the laws of the Federal Republic of Germany and were in business of designing, manufacturing, selling and installing steel pipe and equipment used in the manufacture of steel pipe.

3. Defendant G. L. Rexroth, GmbH ("Rexroth") is and at all times material was a corporation organized under the laws of the Federal Republic of Germany having its principal place of business in the Federal Republic of Germany, and was in the business of designing, manufacturing and selling hydraulic valves and hydraulic systems intended for use in industrial machinery.

4. At all times material products, materials or things processed, serviced or manufactured by Rexroth were used or consumed in this state in the ordinary course of business, and Rexroth was engaged in solicitation or service activities in this state.

5. On or about August 13, 1986, Plaintiff Donald Lee Tipton was injured while working in a steel pipe fabrication plant owned and operated by his employer, Berg Steel Pipe Corporation, in Bay County, Florida.

6. In or about 1979, Bergrohr-Siegen and/or Bergrohr-Herne designed said plant and the mechanical systems used therein for the fabrication of steel pipe, manufactured and/or assembled machinery to be used in the plant, sold said machinery to Berg Steel Pipe Corporation, and installed the machinery in the plant.

7. Among the machinery designed, manufactured, assembled, sold and installed by Bergrohr-Siegen and/or Bergrohr-Herne was a machine known as a "sizer," whose function is to straighten and round sections of pipe. The sizer consists of two larger hourglass-shaped rollers, "arms" which hold the rollers in place, and electric and hydraulic controls. Said hydraulic controls were

manufactured by Rexroth and the hydraulic control system was designed by Rexroth and/or Bergrohr-Siegen and/or Bergrohr-Herne.

8. The sizer is also equipped with a hydraulic control panel, from which the machine operator can release the rollers by hydraulically opening the arms, so that the rollers can be changed to accommodate different sizes of pipe.

9. In order for a sizer roller to be changed safely, the roller being released must be secured by a cable held by an overhead crane before the sizer arms are opened, so that the roller will not fall out of the sizer when the arms are opened.

10. Immediately prior to the accident, Donald Lee Tipton was standing near the sizer to assist in changing the sizer rollers.

11. The accident occurred when the sizer arms opened before the roller was secured to the crane, causing one of the rollers to fall out of the machine and strike Donald Lee Tipton.

12. As a result, Tipton suffered bodily injury, suffered pain therefrom, incurred medical expense in the treatment of his injuries, suffered physical handicap, lost earnings and earnings capacity. The injuries are either permanent or continuing in nature, and Donald Lee Tipton will suffer the losses and impairment in the future.

13. As designed and manufactured by Bergrohr-Siegen, and/or Bergrohr-Herne, and/or Rexroth, the sizer and its hydraulic control system were unreasonably dangerous to the user in the following respects:

A. The sizer was equipped with hydraulic controls which created an unreasonable risk that the control which opens the sizer arms would inadvertently be activated by the operator;

B. The sizer was equipped with hydraulic controls which created an unreasonable risk that the control which opens the sizer arms would be inadvertently left in an open position;

C. The sizer was designed with hydraulic controls which permitted the sizer arms to open upon the activation of controls intended to operate other parts of the sizer;

D. The sizer was not equipped with any audible or visual warning system that would warn persons in the vicinity of the sizer that the arms were open or were about to open, and

E. The sizer lacked written warnings and operating instructions to warn the operator concerning the danger of opening the arms before the roller is secured to the crane.

14. At the time of Tipton's injury, the sizer and its hydraulic control system had not been substantially changed from the time it was delivered by Bergrohr-Siegen, and/or Bergrohr-Herne to the Berg Steel Pipe plant.

15. Tipton's injuries were caused by the defects alleged in Paragraph 13.

WHEREFORE, Plaintiffs demand judgment against Bergrohr-Siegen, Bergrohr-Herne and Rexroth for damages.

COUNT II

16. Plaintiffs reallege paragraphs 1 through 12.

17. After designing, manufacturing, assembling, selling and delivering the sizer, Bergrohr-Siegen and/or Bergrohr-Herne undertook to observe the sizer in operation at the Berg Steel Pipe plant and to make any adjustments or alterations necessary to insure the safe operation of the said sizer.

18. In designing, manufacturing, selling and installing the sizer, and in undertaking to make alterations and adjustments after delivery, Bergrohr-Siegen and/or Bergrohr-Herne had a duty to use reasonable care.

19. In designing and manufacturing the hydraulic controls of the sizer, Rexroth had a duty to use reasonable care.

20. Bergrohr-Siegen, Bergrohr-Herne, and Rexroth breached said duties in the following respects:

A. The sizer was equipped with hydraulic controls which created an unreasonable risk that the control which opens the sizer arms would inadvertently be activated by the operator;

B. The sizer was equipped with hydraulic controls which created an unreasonable risk that the control which opens the sizer arms would be inadvertently left in an open position;

C. The sizer was designed with hydraulic controls which permitted the sizer arms to open upon the activation of controls intended to operate other parts of the sizer;

D. The sizer was not equipped with any audible or visual warning system that would warn persons in the vicinity of the sizer that the arms were open or were about to open, and

E. The sizer lacked written warnings and operating instructions to warn the operator concerning the danger of opening the arms before the roller is secured to the crane.

21. Tipton's injuries were caused by such negligence.

WHEREFORE, Plaintiffs demand judgment against Bergrohr-Siegen, Bergrohr-Herne, and Rexroth for damages.

COUNT III

22. Plaintiffs reallege paragraphs 1 through 18.

23. At all times material, Linda Carol Tipton was and is the wife of Donald Lee Tipton, and as a result of his injuries, she has been deprived of his care, comfort, consortium, companionship and services.

WHEREFORE, Plaintiffs demand judgment against Bergrohr-Siegen, Bergrohr-Herne, and Rexroth for damages.

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury.

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/s/ William A. Bald
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Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

(2)

No. 92-909

In The

Supreme Court of the United States

October Term, 1992

DONALD LEE TIPTON and LINDA TIPTON,

Petitioners,

v.

BERGROHR GMBH-SIEGEN and
BERGROHR GMBH-HERNE,

Respondents.

**On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals**

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners, Donald Lee Tipton and Linda Tipton, (collectively "Tipton"), mischaracterize the motion for summary judgment filed by Respondents, Bergrohr GMBH-Siegen and Bergrohr GMBH-Herne, ("Siegen" and "Herne"), and would have this Court believe that Respondents' motion for summary judgment was only a "partial" motion for summary judgment on certain theories of legal liability. To the contrary, Siegen and Herne's motion for summary judgment was directed toward all of Tipton's claims for negligence and strict products liability. (Pet.App. 24a-51a). If the Tiptons had any doubt that the motion for summary judgment applied to all claims, they needed look no further than the district court's order and notice of Defendants' motion for summary judgment, filed in the U.S. District Court, on or about October 6, 1989 (Appendix A).

While it is true the district court did ultimately base its decision granting summary judgment on the Florida cases of *Lane v. International Paper Company,* 545 So.2d 484 (Fla. 1st DCA 1989); and *Johnson v. Supro Corporation,* 498 So.2d 528 (Fla. 3rd DCA 1986), the district court also acknowledged and applied this court's legal analysis in *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). To-wit, the district court noted:

> "The party who bears the burden of proof on a certain issue at trial also bears the burden of establishing that there are disputed facts with respect to that issue on a motion for summary judgment. *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 Ed.2d 265 (1986). If a

> party fails to make a showing sufficient to establish the existence of an element essential to his case, then summary judgment should be entered against him. In this situation, there can be no 'genuine issue of material fact', because a complete absence of proof of an essential element of that party's case renders all other facts immaterial." *Id* at 322-23. (Pet.App. 18a-19a).

The Tiptons were clearly put on notice in Siegen and Herne's motion for summary judgment that the motion for summary judgment applied to Plaintiffs' claim for negligence. Siegen and Herne's motion for summary judgment stated:

> "More recently, we find the case of *Lane v. International Paper Company,* 14 FLW 1520 (1st DCA Opinion, June 22, 1989).
>
> Since this opinion is yet to be reported in the advance sheets, a copy is attached for the Court's information. Of course, Plaintiff's counsel is intimately familiar with this case since both Plaintiff's counsel were co-counsel in Plaintiff in the *Lane* case.
>
> As stated by First District Court of Appeal:
>
> . . . . **On any theory of products liability,** whether it be for negligent design or manufacture of the product, for breach of implied warranty, or strict liability, in order for the manufacturer to be liable, the injured party must show that the manufacturer is the business of and gains profits from the distribution and sale of the product through the stream of commerce." [Emphasis Supplied] (Pet.App. 30a-31a).

Tipton now claims that Siegen and Herne's motion for summary judgment was limited to the "narrow

ground that Siegen and Herne were not in the business of making or selling size-machines" (Pet.Br. 4), however, the language of Siegen and Herne's motion (Pet.App. D) and the notice given by the trial court (Pet.App. A), show that this was not the case.

ARGUMENT AGAINST ALLOWANCE OF WRIT OF CERTIORARI

Petitioners' argument that the Eleventh Circuit Court of Appeals decision below conflicts with this Court's decisions in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), is not well taken. The Eleventh Circuit decision below applies the doctrines espoused in *Celotex* and *Adickes* in accordance with the law, and specifically in accordance with Rule 56(e) of the Federal Rules of Civil Procedure.

Tipton's argument that Siegen and Herne failed to meet their "initial burden" *as a matter of law* does not comply with reason or common sense given the record submitted in this case. Whether Count II of Tipton's Complaint is interpreted as a "general negligence" claim (Pet.App. 7a-8a), or as a "products liability negligent design" claim (Pet.App. 8a-Footnote 11), there can be no question but that Siegen and Herne's motion for summary judgment was specifically addressed to Counts I and II of Plaintiffs' Amended Complaint (Pet.App. 5). With this in mind, Tipton could not sit idly by relying on a strained interpretation of the pleadings to defeat the

motion for summary judgment. This is precisely what *Celotex* and Rule 56(e) say a non-movant should *not* do when faced with a summary judgment motion, and the law on this issue is clear and unequivocal.

The instant case is similar to *Celotex* in that discovery had been conducted for nearly two years, and no serious argument can be made by Tipton that he was "railroaded" by a premature motion for summary judgment, or one which would not be final as to all claims. *Celotex Corporation v. Catrett*, 106 S.Ct. 2548, 2554, 477 U.S. 325. If Tipton perceived such a problem with Siegen and Herne's motion for summary judgment, he could have properly moved under Rule 56(f) which provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

In any event, Tipton's argument that his burden as the non-movant on the motion for summary judgment was unclear is ludicrous given this Court's statements of the law in *Celotex*, and the Advisory Committee Notes on the 1963 Amendment to Subdivision (e) of Rule 56 of the Federal Rules of Civil Procedure.

In *Celotex v. Catrett*, this Court noted:

> "Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers

> to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial'. . . . **Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves,** and it is from this list that one would normally expect the non-moving party to make the showing to which we have referred." 106 S.Ct. 2548, 2553, 477 U.S. 325. (Emphasis Supplied)

The Advisory Committee Note on the 1963 Amendment to Rule 56(e) details a scenario not unlike the record in the instant case. The committee Note states in pertinent part:

> ". . . . A typical case is as follows: a party supports his motion for summary judgment by affidavits or other evidentiary matters sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation, Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are 'well pleaded', and not supposititious, conclusory, or ultimate. *Citations omitted.*
>
> The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. **The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule."** *Citations*

> *omitted.* Advisory Committee Note on the 1963 Amendment to Rule 56(e), Federal Rules of Civil Procedure. [Emphasis Supplied]

In summary, the dilemma in which Tipton now find himself is of his own making. If Tipton had *any doubt* as to the finality of Siegen and Herne's motion for summary judgment, he should not have relied upon his ambiguously worded Complaint. Alternatively, he should have availed himself of the procedures available under Rule 56(f) to postpone Siegen and Herne's motion for summary judgment. The opinion of the Eleventh Circuit Court of Appeal is well-reasoned and constitutes a proper application of the law given the record in this case.

CONCLUSION

This Court and the Federal Rules of Civil Procedure have done a a more than adequate job of clarifying what the burden of non-movant is in opposing a motion for summary judgment. Petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DONALD LEE TIPTON and
LINDA TIPTON,

Plaintiffs,

v.

Case No.
87-50148-RV

BERGROHR GMBH-SIEGEN, et al.,

Defendants.

ORDER AND NOTICE

Defendants' motion for summary judgment (doc. 60) will be taken under advisement by the Court on October 16, 1989. Because the Court does not contemplate scheduling a hearing on the motion, the parties are directed to file and serve affidavits and any other documents or materials authorized to be filed under the Federal Rules of Civil Procedure prior to the above date. Only those pleadings and evidentiary materials currently in the record or filed prior to the above date will be considered by the Court in ruling on this motion. The motion for summary judgment will result in a final judgment being entered for the moving party, of course, if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and any other appropriate evidentiary materials properly filed in the record show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56,

Fed.R.Civ.P., *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985); *Moore v. State of Florida*, 703 F.2d 516 (11th Cir. 1983).

DONE AND ORDERED this 6th day of October, 1989.

/s/ Roger Vinson
ROGER VINSON
United States District Judge